

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1826 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.R.JAIN

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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JOITABHAI BHAICHANDBHAI PATEL DECD. THRO'HEIRS

Versus

CHAUHAN JAYANTILAL KARSHANDAS

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Appearance:

for Petitioners

MR DK ACHARYA for Respondent No. 1, 2, 3, 4

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CORAM : MR.JUSTICE R.R.JAIN

Date of decision: 11/02/97

ORAL JUDGEMENT

Rule. Mr. Acharya for the respondents waives service of rule. Heard the learned advocates.

1. The petitioners-plaintiffs filed Civil suit No.59 of 1985, claiming ownership of land bearing survey No.120 and for injunction restraining opponents-defendants from interfering with the petitioners' possession. It appears

that the suit was dismissed, therefore, the litigation was carried by petitioners to the lower Appellate Court by preferring Regular Civil Appeal No.54 of 1996. During the course of hearing of the appeal, the petitioners moved an application, Ex.16, under Order 41, Rule 27 read with Sections 107 and 151 of the Code of Civil Procedure for permitting them to produce additional evidence. The petitioners sought to produce as many as 25 documents at appellate stage, but during the course of hearing of this application, Mr. Desai for the petitioners has fairly conceded that he would press for production of documents produced at Sr. No.1, 11 to 16 and 18 to 21 only.

2. It is argued that at the time when the matter was decided, they were not in know of these documents, though were in existence and it is only at the time of taking inspection of record and proceedings of Regular Civil Suit No.177 of 1992 after the disposal of matter they came to know about some of the proceedings initiated by the opponents-defendants and thereupon they inspected R & P of those proceedings and obtained certified copies and the same are sought to be produced as additional evidence at appellate stage. Mr. Acharya for the respondents has objected for production of additional evidence at appellate stage mainly contending that (1) no sufficient cause has been shown as to why the same were not produced at the time of trial; (2) it is not shown that how by exercising due diligence, the documents have now been obtained now; (3) no affidavit has been filed in support of application for production of documents; and (4) the documents are not at all relevant documents so as to assist the Court to pronounce judgment in its proper perspective.

3. It is true that under Order 41, Rule 27, normally additional evidence should not be permitted to be produced at appellate stage except in the circumstances stated therein. An additional evidence at appellate stage can be produced, if the Court from whose decree the appeal is preferred had refused to admit the evidence, though ought to have been admitted. In this case, Mr. Desai for the petitioners does not take recourse to this provision for the simple reason that these documents were never sought to be produced at the trial level and, therefore, the question of not admitting of these documents, though should have been admitted, by the Trial Court does not arise. However, relying upon sub-clause (aa), Mr. Desai has vehemently argued that at the time when the matter was decided, the petitioners were never in no of such documents though were in existence and could lay their hands only on taking search of record and

proceedings of Civil Suit No.177 of 1992 subsequent to the decision by Trial Court. Thereafter, they applied for the certified copies of the documents forming part of Court record. Since this fact goes unchallenged, the first condition that the documents though in existence at the time of hearing but despite due diligence were not found and now have been obtained stands satisfied paving way for production at appellate stage.

3. It is true that the petitioners have not stated in so many words as to how they have come to lay their hands on these documents and whether despite exercise of due diligence at the time of trial they were not able to obtain such documents, but it is evident from paragraph (I) of Ex.16 that the existence of these documents came to their knowledge or notice only after taking inspection of record and proceedings of Regular Civil Suit No.177 of 1992. This amply suggests that they were not in know of these documents at the time when the matter was taken up for final disposal, though the documentary evidence was in existence at that time. In my view, the averments made in paragraph (1) are sufficient to bring the case within the parameters of sub-clause (aa) of Order 41, Rule 27, sub-rule (1) of Code of Civil Procedure. Therefore, objections on this count do not hold good and need further considerations.

4. As regards the relevancy as discussed above, the same piece of land is identified by two different survey numbers by both the parties. The petitioners recognise suit land as survey No.120 whereas same is identified by respondents as survey No.1048. In earlier proceedings, the respondents claimed some rights over the said property. While claiming rights the respondents must have shown the source, title consideration, etc. In this case also, the respondents lay their claim over the same piece of land, therefore, the averments, admissions and allegations made by parties in their respective pleadings concerning the same piece of land would no doubt be very much relevant and material for the purpose of deciding the issue between the parties and pronouncing judgment in its proper perspective.

5. From the record it transpires that the respondents did produce some of the documentary evidence which supports their case withholding the rest which otherwise would have been very much material and relevant for the purpose of deciding the issue. As held by Supreme Court in the case reported in J.T. 1993(6) 331, a duty is cast upon the parties to the litigation to come to the Court with true case and prove it by true

evidence. The Courts of law are meant for imparting justice between the parties. The parties coming before the Court should always come with clean hands and should not be allowed to abuse process of Court and should not be permitted to use the Court process as a convenient lever to retain illegal actions indefinitely. In this case, from the documents sought to be produced it becomes abundantly clear that the defendants knew very well about the boundaries of the property claimed by them as well as the boundaries of the property which is the subject matter of the suit. It is further evident that, at the instance of respondents only Commissioner was appointed to prepare sketch of the property bearing survey No.120 and other adjoining properties. This would definitely be a relevant evidence and if brought on record, in my view, it would help the Court to resolve the controversy between the parties qua the suit property.

6. As regards the scope of Rule 27 permitting production of additional evidence at appellate stage, Mr. Acharya has relied upon a judgment reported in AIR 1996 Raj. 182, wherein the landlord intended to improve his case by producing witness at subsequent stage. On facts, it was observed that the endeavour is nothing else but to fill up the lacunae, as a result of which the request for tendering evidence at appellate stage was turned down. In the case before the Supreme Court in the matter of Natha Singh v. Financial Commissioner, Taxation, Punjab, reported in AIR 1976 SC 1053, the Court was called upon to decide the meaning of word "relevancy" of documentary evidence and held that the true test to be applied in dealing with the application for additional evidence is whether the Appellate Court would be able to pronounce the judgment on the materials before it, without producing the additional evidence sought to be produced. In other words, if for doing substantial justice to the parties, the documents sought to be produced as additional evidence are required to be referred by the Appellate Court, then the evidence would be relevant and permitted to be produced at appellate stage. On facts, the decision rendered by the Apex Court helps the petitioner as discussed above but the decision in the case reported in AIR 1982 Raj. 182 has no application on facts.

8. In light of aforesaid observations, I am of the view that the Court below has committed an error of law in not permitting the petitioners to produce additional evidence and, therefore, the impugned order dated 10th October, 1996, passed in Regular Civil Appeal No.54 of 1996 is required to be partly quashed and set aside to

the extent that petitioners are permitted to produce additional documentary evidence at Sr. No.1, 11 to 16 and 18 to 21 along with application Ex.16. Accordingly, the application stands allowed. Rule is made absolute to the aforesaid extent with no order as to costs.

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